Task Force on the Arizona Rules of Civil Procedure

Offices of Osborn Maledon, Phoenix

Meeting Minutes: December 17, 2015

Members attending: William Klain and David Rosenbaum (co-chairs), Jodi Feuerhelm, Michael Gottfried by his proxy Sara Agne, Milton Hathaway, Rebecca Herbst, Andrew Jacobs, Hon. Michael Jeanes by his proxy Aaron Nash, Hon. Douglas Metcalf by his proxy Chas Wirken, Hon. Mark Moran, Prof. Catherine O'Grady, Brian Pollock, Greg Sakall, Hon. Peter Swann, Hon. Randall Warner

Absent: Pamela Bridge, Dev Sethi

Staff: Mark Meltzer, John W. Rogers, Nick Olm, Sabrina Nash

1. Call to order, introductory comments, approval of meeting minutes. The chairs called the meeting to order at 10:32 a.m. This is the sixteenth meeting of the Task Force. The members have so far devoted more than 2,000 hours of their time to Task Force and workgroup meetings. They have spent many additional hours researching, drafting, and revising the rules outside of meetings.

The chairs presented this project to the Superior Court Presiding Judges on December 9, 2015. The presiding judges had no issues with the uniform font size or page limits proposed by the Task Force. The State Bar's Civil Practice and Procedure Committee ("CPPC") will assist the superior court in various counties with amendments to their local rules that might be required by these uniform requirements. The chairs also presented the project to the Arizona Judicial Council on December 10, 2015, which passed a formal motion of support for the work of the Task Force.

The chairs asked the members to review draft minutes of the November 20, 2015 meeting, and the December 3, 2015 meeting that was held concurrently with the CPPC. There were two changes to the November draft minutes. First, an item concerning proposed Rule 42.1 was attributed to Mr. Pollock; the item was actually presented by Ms. Feuerhelm. Second, on the discussion on Rule 12, the draft minutes state that the members decided that the rule should only use the word "answer," whereas they actually agreed to use both "answer" and "responsive pleading" in the rule.

Motion: With these corrections, a member moved to approve the November 20, 2015 and December 3, 2015 minutes, another member made a second, and the motion passed unanimously. **TF.ARCP: 2015-16**

2. Good faith settlement hearings. The vetting draft excluded current Rule 16.2, which provides for good faith settlement hearings. Ms. Feuerhelm and Mr. Rogers asked to revisit this rule. Mr. Rogers presented an analysis, beginning with statutory changes a number of years ago to Arizona's law on joint and several liability. These changes greatly limited the circumstances of joint and several liability, but in the limited situations where it continued to apply, a good faith settlement hearing could serve to cut off contributions claims. Those situations involved narrowly prescribed instances of parties acting in concert, vicarious liability, and actions under the Federal Employers' Liability

Act. Although the instances when joint and several liability continue to exist under the statute are infrequent, Mr. Rogers recommended including a modified version of Rule 16.2 in the rule petition. His draft rule was included in the materials. One member felt there was no need to keep the rule; he noted, for example, that no rule is required to conduct a good faith hearing under *USAA v. Morris*. Another member nonetheless made a motion:

> **Motion:** The rule petition should include Rule 16.2 regarding good faith settlement hearings, as shown in Mr. Rogers' draft. The motion received a second and passed with 12 members in favor and 1 opposed. **TF.ARCP: 2015-17**

In the next version of the rules, Ms. Feuerhelm will add Rule 16.2, and renumber the current draft Rule 16.2 (regarding case management conferences in complex civil litigation) as Rule 16.3.

3. Unfair prejudice. At the November 20 meeting, members discussed whether the word "prejudice," when used in the rules, is necessarily "unfair prejudice." (See section 2 of the November 20 minutes.) Ms. Feuerhelm researched the issue and did a global search of the draft rules for "prejudice," and she presented her recommendations.

Rule 4(h). The current Arizona rule allows amendment of a proof of service unless the court finds "material prejudice" to the "substantial rights" of the party subject to service. The corresponding federal rule simply provides that "the court may permit proof of service to be amended." Discussion ensued.

> **Motion:** A member moved to adopt the federal version. The motion received a second and passed unanimously. **TF.ARCP: 2015-18**

Rule 6(b)(2)(C). The proposed Task Force version of this rule on extending time requires a finding that no party would be "unfairly prejudiced" by extending the time to act. The word "unfairly" is not in the current rule, and there is no corresponding federal rule. The members discussed whether mere prejudice was an acceptable showing, or whether it should be "unfair." Some members believed that including the word "unfair" might imply that the Task Force intended a substantive change to the rule. Other members believed that "unfair" adds essential meaning to the word "prejudice." One member noted a distinction between unfair prejudice that arises under procedural rules and that which arises under rules of evidence. Procedural prejudice implies an impairment of rights; it may not rise to the level of losing a case, but it hurts the party's position. (See further on evidentiary prejudice *State v Guarino*, a December 2015 Supreme Court opinion, which stated in part that "while evidence that makes a defendant look bad may be prejudicial in the eyes of jurors, it is not necessarily unfairly so.")

> **Motion:** Ms. Feuerhelm moved to revert to the current rule, i.e., to remove the word "unfair" from the Task Force draft of this rule. The motion received a second and passed with 11 members in favor and 2 opposed. After further discussion and reconsideration, the motion again passed, 10 in favor and 3 opposed. **TF.ARCP: 2015-18**

Rule 15: Rule 15(b)(1) allows amendments during trial if, among other factors, there is no showing that an amendment would "unfairly prejudice" the objecting party's claim or defense. Neither the current Arizona rule nor the corresponding federal provision includes the word "unfairly."

One member observed that any amendment during trial would prejudice the opposing side, and therefore "unfair" prejudice should be the standard. A judge member stated that including the word "unfair" provides guidance to judges who must perform an analysis during an ongoing trial. Mr. Klain referred to Arizona case law, which includes in the concept of prejudice such notions as inconvenience, delay, and hardship. Some members supported conforming to the federal version, which would facilitate citation to federal case law interpreting the rule, while others believed that Arizona judges could interpret their own rules without referring to the opinions of federal judges.

Motion: Ms. Feuerhelm moved to revert to the current rule, i.e., to remove the word "unfair" from the Task Force draft of Rule 15(b)(1). The motion received a second and passed with 8 members in favor and 5 opposed. **TF.ARCP: 2015-19**

Task Force members agreed to Ms. Feuerhelm's recommendations on the following rules, none of which require changes to the current Task Force draft:

- Rule 37(g)(2), Rule 15(c), Rule 19(b)(1) and (2), Rule 20(b), Rule 36(b), Rule 37(g)(2), and Rule 42(b), all of which use the word "prejudice" without a qualifier.
- Rule 24(b)(3), which uses the phrase "unduly delay or prejudice."
- Rule 26(b)(5), which includes the phrase "lack of unfair prejudice to all other parties."

4. Workgroup 1. Mr. Jacobs reported that he had no issues to discuss on behalf of the workgroup.

5. Workgroup 2. Mr. Pollock advised that workgroup 2 had several rules that required further Task Force input.

Rule 25(d) ["Public officers; death or separation from office"]. The current rule (Rule 25(e)) provides for automatic substitution. The current Task Force draft requires that counsel for the public officer "must file a notice of the substitution." Mr. Pollock spoke with litigators in the Attorney General's office, and based on those conversations he believes those litigators do not have such a large caseload as to make the filing of a notice impractical or burdensome. The issue then presented was whether the filing of a notice would serve to change the case caption. Mr. Nash distinguished a caption in the court's case management system (what the court uses) from a caption contained on a court filing (what the parties use). A notice alone won't change a caption in the CMS; that would require a motion and a court order. But after further discussion, the members agreed to leave Rule 25(d) as it is in the proposed draft.

Rule 26.1(b)(1) ["Disclosure of hard copy documents"]. Mr. Pollock reminded the members of a comment from the Chamber of Commerce about adding a new subpart (11) to Rule 26.1(a). Although the Task Force declined to do this, it believed the Chamber's

comment had value. Accordingly, workgroup 2 most recent revision to this rule included the following provision: "If a party withholds any such hard copy document from production, it must in its disclosure identify the document along with the name, telephone number, and address of the document's custodian." Mr. Pollock noted that a parallel provision is not necessary in Rule 26.1(b)(2) because the parties should be discussing this pursuant to their duty to confer regarding electronically stored information ("ESI").

Rule 26.1(b)(2)(D) ["Electronically stored information; presumptive form of production"]. Mr. Pollock advised that at its December 3 meeting, the CPPC, with near unanimity, agreed to add to the first sentence the words, "with the court authorized to shift costs as appropriate." One member suggested making this a standalone sentence. (E.g., "If the requested form results in a cost burden, the court is authorized to shift costs.") Although this member thought this addition would be helpful to practitioners, others thought it was redundant because the concept is already expressed in Rule 26.1(b)(2)(A)(iii). Mr. Rogers observed that the CPPC did not readily connect the latter provision with 26.1(b)(2)(D), and the Task Force should be sensitive to the CPPC's concerns. Mr. Rosenbaum suggested that ESI production under Rule 34 could include a matching provision in subpart (b)(3)(E), although this would represent a divergence from the corresponding federal Rule 34. Mr. Pollock noted that there is already a cost shifting provision in Rule 16(b)(3)(A). The Task Force concluded its discussion by agreeing that it would not include additional language in its draft concerning cost shifting.

Rule 37(g)(2)(B)(iii) ["Remedies and sanctions"]. The most recent Task Force draft did not revise this provision. However, Mr. Pollock noted that the language in the provision, although not in the federal rule, was strongly supported by the CPPC (which had only a single dissent).

Rule 26(b)(1) ["Discovery scope and limits, generally"] and Rule 26.1(a)(9) ["Duty to disclose; disclosure categories"]. The Task Force continued its discussion of these related provisions and the phrase "reasonably calculated," which currently appears in both rules. The CPPC also had an extensive discussion of these provisions. Some believe that "reasonably calculated" defines the scope of discovery, that is, information is discoverable if it is either relevant "or" is "reasonably calculated" to lead to the discovery of information. Others believe that the scope is defined solely by relevance, and that the phrase "reasonably calculated" contemplates information that is inadmissible but is nonetheless relevant. The CPPC did not yet take a formal vote on this issue, but later it may file a comment to the rule petition.

Mr. Rosenbaum referred to comments on the new federal rules, which cite authorities debunking what they believe is an incorrect interpretation that "reasonably calculated" is a separate basis for discovery. ("Reasonably calculated" no longer appears in the federal rules.) Mr. Pollock on the other hand cited Arizona case law that was split on interpretation of the phrase. Some opinions indicate that relevancy alone is the standard, while others say either relevant or "reasonably calculated" will suffice. Other remarks from the members on this point included the following:

- If "reasonably calculated" is deleted from the Arizona rule, some will view this as a substantive change that limits the scope of discovery. Judges might then get more discovery motions.
- Evidence that may be "relevant to the subject matter" is too broad in the sense it might have nothing to do with evidence that will be relevant at trial.
- As a practical matter, the standard of "relevant to the subject matter" may be congruent with a standard of "relevant to the claims and defenses."
- There should not be different standards under Rule 26(b) and Rule 26.1(a).
- Arizona's rules on scope are working well and there's no need to change them.
- A standard of "reasonably calculated" invites fishing expeditions and allows discovery about discovery.
- "Reasonably calculated" is a limitation and a way to reign in fishing expeditions, and even if taken out of Rule 26.1, it should remain in Rule 26(b).
- "Reasonably calculated" in the context of disclosure requires parties to hypothesize about how information could lead to discoverable evidence, and parties should not be required to engage in that exercise.
- The federal rules have sent a message that discovery is getting out of control and should be limited. The Task Force would send the wrong signal if it does not adopt that approach. The Task Force should follow the lead of the federal rules changes on discovery.

Members then discussed possible revisions to these rules. The members' consensus reaffirmed their prior decision to remove "reasonably calculated" from Rule 26.1(a)(9). The members also proposed revising the last sentence of the current draft of Rule 26(b)(1)(A) as follows:

> "**(A)** *Scope*….It is not a ground for objection that the information sought, though relevant, will be inadmissible at trial if that information appears reasonably calculated to lead to the discovery of admissible evidence.

The members were mindful that this language may be inconsistent with Arizona decisional law cited by Mr. Pollock. Nonetheless, they proceeded to vote on the following motion:

> **Motion:** A member moved to adopt the aforesaid revisions to Rule 26(b)(1)(A). The motion received a second and it passed, 10 in favor and 3 opposed. **TF.ARCP: 2015-20**

The members further proposed to revise the first part of the current draft of Rule 26(b)(1)(B) so that it reads as follows:

> "**(B)** *Limits on Discovery.* Discovery is impermissible if it:
> [then continue with the language of (i), (ii), and (iii) of the draft]."

The members agreed that this new language, if adopted by the Court, would make discovery limits self-executing; unlike the current rule, and with this proposed amendment, parties would not require a court order to limit the scope of discovery.

Motion: A member moved to adopt the aforesaid revisions to Rule 26(b)(1)(B). The motion received a second and it passed unanimously. **TF.ARCP: 2015-21**

6. Workgroup 4. Mr. Hathaway discussed several rules on behalf of the workgroup.

Rule 60 ["Relief from judgment or order"]. Mr. Hathaway requested input from the members regarding the distinction between Rule 60(e)(2) and Rule 60(a), which both deal with correction of a judgment. After discussion, the members suggested breaking these rules into two components, one to address situations where a correction was mandatory, and another for those where correction is permissive.

Rule 75 ["Hearing procedures"]. The members discussed subpart (b) regarding initial disclosures. Thee members agreed with Mr. Hathaway's suggestion that this provision should be relocated in Rule 74 concerning pre-hearing procedures.

Rule 76 ["Post-hearing procedures"]. Current Rule 76(d) provides that if no application for entry of judgment is filed within 120 days from the date of filing a notice of decision, and no appeal is pending, the case will be dismissed. The Task Force draft does not contain an analogous provision, and a Division One decision earlier this year in *Phillips v. Garcia*, 237 Ariz. 407 prompted the workgroup to further consider its draft of this rule. Mr. Hathaway suggested that the draft revert to the current rule, but he would add that the clerk must give notice to the parties before dismissing the case. Mr. Klain recommended that the workgroup provide its proposed change to staff, who could then circulate it to Task Force members for review. Mr. Rogers suggested using Rule 38.1 as a guide to drafting. Judge Warner noted that a new notice requirement might require changes in the clerk's processing of the case.

Rule 80 ["General provisions"]. Mr. Hathaway simply noted that certain sections of this rule had been relocated, while other subparts were renumbered.

7. Workgroup 3. Ms. Feuerhelm discussed Rules 42.1 and 54.

Rule 42.1 ["Change of judge as a matter of right"]. The words "a matter" have been added to the title of this rule. Ms. Feuerhelm also noted that in subpart (c)(3), the time period runs from the appellate court mandate rather than from any notice or action by the superior court clerk.

Rule 54 ["Judgment; costs; attorney's fees; form of proposed judgment"]. An addition to Rule 54(a) now includes a provision that no judgment is final unless it recites it is entered under subpart (b) or (c). Rule 54(b) also includes express language requiring a recital. Rule 54(a) contains a definition of a "decision." The definition does not require that a decision be signed, but Rule 58(b)(1) requires that all judgments must be signed. Ms. Feuerhelm explained that an unsigned decision can trigger deadlines, for example, for requests for costs and attorney's fees.

Rule 54(f) concerning costs includes a number of revisions, many of which were recommended by the CPPC. Rule 54(f)(2)(D) includes a provision for filing a reply, which is not provided for in the current rule. Ms. Feuerhelm discussed the timing structure of revised Rule 54(f), as well as the timing of claims for attorney's fees under Rule 54(g). Task Force members concurred with these revisions and commended Ms. Feuerhelm for her work in refining them. The members discussed a requirement that a party must include underlying documentation with a statement of costs, but decided against it. Proceeding further with the rule, Ms. Feuerhelm noted Rule 54(h) concerning a proposed form of judgment. The rule requires a blank space in the proposed form of judgment that allows the court to insert costs and fees if a specific amount is not stated in the form. There is a new Rule 54(i) regarding the scope of the rule and superior court jurisdiction under the rule. On a related matter, Ms. Feuerhelm pointed out the deletion of draft Rule 58(b)(3), the substance of which is now in Rule 54.

8. Draft rule petition. Mr. Rosenbaum noted that the "disposition table" in the meeting materials had been recently revised. It will require further revision, and he encouraged workgroups to submit any changes to staff as soon as possible. The members agreed that the table might have minimal value in a few years, but it should be included with the rule petition, as a separate appendix, in the event the court wants to promulgate with the civil rules amendments.

Rachel Jacobs at Snell and Wilmer, under the guidance of Mr. Jacobs, researched and prepared a lengthy list of cross-references in other sets of Arizona rules of procedure to the civil rules. The members expressed great appreciation for their efforts. The chairs will divide these cross-references among the workgroups, who will initially determine what changes are necessary to those other rules. For those rules that require changes, the Task Force will need to prepare versions with strikethrough and underline. This will be a substantial document, and because the rule amendments are still subject to reconsideration during the initial comment period, the chairs agreed that filing this document could be deferred until the time of filing an amended petition.

The draft petition now includes the following dates for a modified comment period:

April 1, 2016:	First round of comments due (changed from April 15)
May 13, 2016:	Amended petition due
June 10, 2016:	Second round of comments due
July 8, 2016:	Reply due

Appendix D, the detailed rule-by-rule explanation, was attached to the draft petition in the meeting materials. Appendix D may require further revision, especially following today's meeting. Mr. Rosenbaum requested that the workgroups send their edits to staff. Appendix D should note that Rules 85 and 86 will be abrogated.

Mr. Rosenbaum also reviewed recent revisions to the draft petition. He suggested that the petition note that the Task Force did not abrogate any of the Rule 84 forms because they have continuing utility. Some forms, including the subpoena, may require

conforming changes to the proposed rule amendments. Ms. Feuerhelm will review the subpoena form, and Mr. Pollock will review the joint report and proposed scheduling order forms.

9. Roadmap. Ms. Feuerhelm set Monday, December 28, 2015 as a deadline for workgroup chairs to send their final rule revisions to her. She will then prepare complete clean and redline versions for filing with the rule petition the first week of January.

After conferring regarding a date, the next Task Force meeting was set for Thursday, April 14, 2016, at 10:30 a.m. Scheduling of additional meetings will abide the April 14 meeting. Mr. Rosenbaum suggested the workgroups review Rules Forum comments prior to the April 14 meeting as a foundation for discussions at that meeting.

Professor O'Grady announced that Judge John Bates, who sits on the United States District Court for the District of Columbia and was actively involved in the recent federal rule amendments, will speak at the Rogers College of Law on January 26, 2016. Task Force members should let her know if they are interested in attending this presentation.

10. Call to the public, adjourn. There was no response to a call to the public. The meeting adjourned at 2:35 p.m.